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No. 983

In the Supreme Court of the United States

OCTOBER TERM, 1962

BUCK WILCOXSON, PETITIONER

v.

UNITED STATES OF AMERICA, STEWART L. UDALL, AS SECRETARY OF THE INTERIOR, AND KERR-MCGEE OIL INDUSTRIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AND STEWART L. UDALL, SECRETARY OF THE INTERIOR

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulation involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Atherton v. *Fowler*, 96 U.S. 513 — 9

Benson Mining Co. v. *Alta Mining Co.*, 145 U.S. 428 — 9

Carroll v. *Safford*, 3 How. 441 — 9

Erie Coal & Coke Corp. v. *United States*, 266 U.S. 518 — 6

Moore v. *Robbins*, 96 U.S. 530 — 9

Southern Pacific Company v. *Olympian Dredgery Co.*, 260 U.S. 205 — 6

Union Oil Co. v. *Smith*, 249 U.S. 337 — 9

United States v. *Ickes*, 72 F. 2d 71 — 8

United States v. *Weisbrod*, 202 F. 2d 629, certiorari denied, 346 U.S. 819 — 7

Wyoming v. *United States*, 255 U.S. 489 — 7, 8

Statutes and regulations:

Federal Tort Claims Act, 28 U.S.C. 1346(b) — 5

Isolated Tracts Act, Section 2455, Revised Statutes, as amended, 43 U.S.C. 1171 — 2, 3, 7, 8

886135—63

	Page
Revised Statutes:	
Section 2318 (30 U.S.C. 21)	5
Section 2325	9
Section 2478, Revised Statutes, as amended, 43 U.S.C. 1201	3
30 U.S.C. 21 *et seq*	5
43 C.F.R. Part 250	4, 7
43 C.F.R. 250.5	3, 4, 6
Miscellaneous:	
Restatement of Contracts, Sec. 27	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 313 F. 2d 884. The opinion of the district court is not reported. It is set forth at pages 195–198 of the record from the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1963 (Pet. App. 9a–10a). The petition for a writ of certiorari was filed April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior, under a statute empowering him to sell at public auction isolated tracts of public lands "which, in his judgment, it would be proper to expose for sale," and to execute this task by means of "appropriate regulations," could validly issue a regulation providing that no rights of any kind should accrue to a purchaser until a cash certificate had been issued to him.

STATUTES AND REGULATION INVOLVED

Section 2455, Revised Statutes, as amended, 43 U.S.C. 1171, referred to herein as the "Isolated Tracts Act," provides:

> *Sale of isolated or disconnected tracts.* Notwithstanding the provisions of section 678 of this title and of sections 212, 321, 662, and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but

> in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: * * *.

Section 2478, Revised Statutes, as amended, 43 U.S.C. 1201, provides:

> *Power of Secretary or designated officer.* The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

The regulation of the Secretary of the Interior involved is 43 C.F.R. 250.5, which provides:

> *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.

STATEMENT

On September 23, 1952, petitioner filed applications with the Land Office at Santa Fe for the sale of two tracts of public land (R. 64, 123). Each application requested that the tract be sold under the Isolated Tracts Act, Section 2455, Revised Statutes, as amended, 43 U.S.C. 1171, *supra*, and the regulations

thereunder (43 C.F.R. Part 250), and stated that there were no indications of minerals of any kind on the land. The Land Office obtained appraisals and land classification reports stating that, while the tracts had not been examined in the field and while active uranium mining activities were being conducted in adjacent areas, there were no known uranium mining activities within the immediate vicinity of the sections involved (R. 112, 115).

Public sales were held on November 16 and 17, 1953. Petitioner was declared to be the purchaser of part of one tract on February 17, 1954, and of part of the other tract on January 31, 1955 (R. 80, 130). He had paid the purchase price of the two tracts on November 17, 1953, and December 9, 1953, respectively, and had obtained receipts (R. 33, 141).

On May 10, 1955, petitioner advised the manager of the Santa Fe Land Office that several persons had been prospecting for uranium on these tracts and inquired whether he had any right to prevent this activity, and also when he could expect to receive his cash certificates (R. 82). In reply, the manager referred him to 43 C.F.R. 250.5, *supra*, and informed him that, inasmuch as cash certificates had not been issued, he had no right to prevent the prospecting, and that action on the applications had been suspended pending further investigation as to the mineral character of the lands (R. 83–84).

Mineral reports were obtained which showed the discovery of ore and several recorded mining claims, including one recorded before petitioner was declared the purchaser of one tract (R. 89–93, 118–122). The

manager thereupon declared the sales null and void because, under Section 2318 of the Revised Statutes (30 U.S.C. 21), lands valuable for minerals could not be sold in this manner (R. 87, 136). The Director of the Bureau of Land Management (R. 138), and ultimately the Secretary of the Interior (R. 96–101), affirmed the manager's decision that the Department was free to reject the application (R. 139) and to withdraw the land from sale (R. 100).

Petitioner then filed in the District of Columbia an action in the nature of mandamus to compel the Secretary to issue the cash certificates (R. 154). Kerr-McGee Oil Industries, Inc., the claimant under the mining laws (30 U.S.C. 21 *et seq.*) as to one of the tracts, intervened to protect its asserted interest (R. 174). Petitioner also instituted an action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages alleged to have been sustained by failure to issue him cash certificates (R. 185). Finally, the United States sought a declaratory judgment that petitioner has no rights in the properties and an injunction against the prosecution by petitioner of any further litigation based on the facts of these cases (R. 4, 10). Petitioner filed a cross-claim against Kerr-McGee seeking an injunction and an accounting (R. 14).

The three cases were consolidated by the district court and decided on cross-motions for summary judgment. The court upheld the decision of the Secretary that petitioner had no rights in the two tracts as against the United States, and dismissed with prejudice his mandamus and tort actions, as well as his

cross-claim against Kerr-McGee (R. 198). It also held that the mining claims of Kerr-McGee are not yet mature for judicial determination. The court of appeals affirmed.

ARGUMENT

The decisions of both courts below are plainly correct and are not in conflict with the decision of any other court. Accordingly, there is no occasion for further review.

1. The complete answer to petitioner's reasoning and authorities is that Congress, in giving the Secretary of the Interior unqualified discretion to decide whether and when a particular isolated tract should be sold at auction, necessarily clothed him with authority to prescribe the terms of the sale and, specifically, to designate what action on his part would constitute a definitive acceptance of an applicant's offer to buy. Having discretion to withhold the tracts from the market altogether, the Secretary plainly had power to offer them conditionally. Cf. *Erie Coal & Coke Corp.* v. *United States*, 266 U.S. 518, 520–521; Restatement of Contracts, Sec. 27. For the "power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval." *Southern Pacific Company* v. *Olympian Dredging Co.*, 260 U.S. 205, 208.

Here, the Secretary provided by regulation (43 C.F.R. 250.5) that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant

or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States." It was subject to this reservation that the lands were offered and petitioner invited to bid. His application requesting the sale of these lands under 43 U.S.C. 1171 was made with explicit reference (R. 64, 123) to "the regulations thereunder" (43 C.F.R. Part 250), and if he considered the reservation unacceptable, he was free not to apply. Cf. *United States* v. *Weisbrod*, 202 F. 2d 629, 633 (C.A. 7), certiorari denied, 346 U.S. 819.

The fact that the challenged regulation was not issued until 1944 in no way impairs its validity, for, as the court below stated, there is no rule of law which precludes the exercise of otherwise valid regulatory power simply because of the passage of time.

2. Petitioner's contention (Pet. 7–16) that the decisions below are in conflict with decisions of this Court is groundless. *Wyoming* v. *United States*, 255 U.S. 489—upon which he chiefly relies—arose under a statute whereby Congress itself appropriated certain lands for selection by the States, leaving to the land officers merely the non-discretionary task of ascertaining whether the State's selection met the requirements of the congressional offer. Since the selection was not "merely a proposal by the State which the land officers could accept or reject," and since the "power confided to them was not that of granting or denying a privilege to the State, but of determining whether an ex-

isting privilege conferred by Congress had been lawfully exercised * * *" (*id.* at 496), the Court held that equitable title vested at the time of the selection and not at the time of the officers' later approval. Here, the crucial distinction, as the court below recognized (Pet. App. 6a–7a), is that the Isolated Tracts Act entrusted to the Secretary's discretion the decision whether or not to sell the tracts at all; petitioner's application was merely a proposal with the Secretary was free to accept or reject, and in a manner defined by him in advance. See *United States* v. *Ickes*, 72 F. 2d 71, 73–76 (C.A.D.C.). True, there was dictum in the *Wyoming* case to the effect that under the cash sale system—of which the Isolated Tracts Act is a part—the right to the land vests when the price is paid (Pet. 14). Those comments, however, merely described the legal consequences of a cash entry under the system as it existed prior to the adoption of the regulation involved here. The Court did not say that the responsible executive (be he the President, the Commissioner of the General Land Office, or the Secretary) has no power to issue a regulation prospectively qualifying the terms of the auction, but merely that, once having offered the land without reservation, he could not unilaterally rescind the contract after the applicant had paid the price and thereby accepted the offer. Similarly, the statements relied upon by petitioner (Pet. 8–9) from earlier cases—none of which involved the issue presented here—were simply descriptive of the cash sale pro-

cedures which antedated the adoption of this regulation.[1]

3. Petitioner errs in asserting that the United States has no interest in the litigation because it is a mere stakeholder (Pet. 18–19). As the court of appeals noted (Pet. App. 8a, fn. 10), the United States has legal title to the tracts in question. The mining claimants do not now and may never seek title.[2] *Union Oil Co.* v. *Smith*, 249 U.S. 337, 348–349. The United States alone is defending against petitioner's claim for $6,000,000 under the Federal Tort Claims Act.

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[1] All of these cases are readily distinguishable. *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, involved a dispute between applicants for a patent to mineral lands and a subsequent locator. The Court held (p. 431–432) that "when the price is paid the right to a patent immediately arises" because Section 2325, Revised Statutes, pertaining to mineral lands, provided, with respect to mineral lands, that "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer * * *." There is no such provision in the present statute. *Moore* v. *Robbins*, 96 U.S. 530, involved a controversy between one who bought land at public sale, paid the purchase price and received a certificate of purchase, and a preemptor who claimed the land by prior right. The Court decided that the preemptor failed to make proof of payment and failed to file his affidavit of settlement as required by the preemption statute under which he claimed. In *Carroll* v. *Safford*, 3 How. 441, the Court held that, where a purchaser had paid the price for public land and been granted a patent certificate but not yet the patent itself, Michigan could tax the property because the purchaser "held for it a final certificate, which could no more be cancelled by the United States than a patent" (p. 460). No such certificate has been issued in the present case. In *Atherton* v. *Fowler*, 96 U.S. 513, the principal issue was whether a person who had entered upon land by forcefully dispossessing a prior occupant could succeed to the latter's rights of preemption, the Court holding not.

[2] As to one of the tracts, Kerr-McGee asserts no interest whatever—not even a mining claim.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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